

ARTICLE 7. OPINION AND EXPERT TESTIMONY

Introductory Note to Original 1977 Rules: Problems of Opinion Testimony.

The rules in this article are designed to avoid unnecessary restrictions concerning the admissibility of opinion evidence; however, as this note makes clear, an adverse attorney may, by timely objection, invoke the court's power to require that before admission of an opinion there be a showing of the traditional evidentiary prerequisites. Generally, it is not intended that evidence which would have been inadmissible under pre-existing law should now become admissible.

A major objective of these rules is to eliminate or sharply reduce the use of hypothetical questions. With these rules, hypothetical questions should seldom be needed and the court will be expected to exercise its discretion to curtail the use of hypothetical questions as inappropriate and premature jury summations. Ordinarily, a qualified expert witness can be asked whether he or she has an opinion on a particular subject and then what that opinion is. If an objection is made and the court determines that the witness should disclose the underlying facts or data before giving the opinion, the witness should identify the facts or data necessary to the opinion.

In jury trials, if there is an objection and if facts or data upon which opinions are to be based have not been admitted in evidence at the time the opinion is offered, the court may admit the opinion subject to later admission of the underlying facts or data; however, the court will be expected to exercise its discretion so as to prevent the admission of such opinions if there is any serious question concerning the admissibility, under Rule 703 or otherwise, of the underlying facts or data.

Rule 701. Opinion Testimony by Lay Witnesses.

If a witness is not testifying as an expert, testimony in the form of an opinion is limited to one that is:

- (a) rationally based on the witness's perception;
- (b) helpful to clearly understanding the witness's testimony or to determining a fact in issue; and
- (c) not based on scientific, technical, or other specialized knowledge within the scope of Rule 702.

Comment to 2012 Amendment

The 2012 amendment of Rule 701 adopts Federal Rule of Evidence 701, as restyled.

Cases

701.020 The opinion must be rationally based on the witness's own perceptions.

State v. Hughes, 193 Ariz. 72, 969 P.2d 1184, ¶ 47 (1998) (to be competent to offer opinion on person's sanity, lay witness must have had opportunity to observe past conduct and history of person; because witnesses only saw defendant after arrest and thus not over long period of time, these witnesses were not competent to give opinion on defendant's sanity).

ARIZONA EVIDENCE REPORTER

State v. King, 226 Ariz. 253, 245 P.3d 938, ¶ 13 (Ct. App. 2011) (during videotaped police interview and during trial testimony, witness was asked how hard defendant had kicked victim and then was asked to use chair to demonstrate how hard kick was; court held witness was not testifying as expert and was instead testifying based on witness's own perceptions).

State v. Miller (Estrella), 226 Ariz. 202, 245 P.3d 887, ¶¶ 7–11 (Ct. App. 2010) (state's witness had monitored and transcribed numerous wiretap recordings of conversations between defendant and persons connected with defendant, many of which were in Spanish; court held witness could authenticate law enforcement interview tapes and tapes of jailhouse telephone calls by identifying voices on tapes based on her experience with the monitoring and transcribing, and was not testifying as expert and was instead testifying based on witness's own perceptions).

Boomer v. Frank, 196 Ariz. 55, 993 P.2d 456, ¶¶ 24–25 (Ct. App. 1999) (because witnesses' opinions were based on their perceptions, trial court, in ruling on motion for summary judgment, could consider statements of witnesses who saw the vehicle before accident and opined that vehicle was exceeding posted speed limit and did not stop for stop sign).

State v. Tiscareno, 190 Ariz. 542, 950 P.2d 1163 (Ct. App. 1997) (victim permitted to testify that her nose was broken from being hit by defendant; a person does not have to be medical expert to testify that their nose is broken).

701.033 A lay witness may not give an opinion about the accuracy, reliability, or truthfulness of a particular person, or quantify the percentage of such persons who are truthful.

State v. Boggs, 218 Ariz. 325, 185 P.3d 111, ¶¶ 37–40 (2008) (during videotaped interrogation of defendant, detective accused defendant of lying; defendant claimed playing videotape to jurors violated his right to fair trial; court held that detective's accusations were part of interrogation technique and not for purpose of giving opinion testimony at trial, thus no error).

701.035 If the testimony of two witnesses is contradictory and that could be the result of poor ability or opportunity to perceive, faulty memory, mistake, or poor ability to relate what happened, asking one witness in those situations whether the other witness is lying is improper, but when the only possible explanation for the inconsistent testimony is deceit or lying, or when one witness has opened the door by testifying about the veracity of the other witness, asking one witness whether the other witness is lying may be proper.

State v. Canon, 199 Ariz. 227, 16 P.3d 788, ¶¶ 40–44 (Ct. App. 2000) (defendant claimed prosecutor acted improperly by asking him on cross-examination about differences between his testimony and officer's testimony and asking him to comment on officer's credibility; court held that, even if it assumed prosecutor's questions constituted misconduct, it was not so pervasive or pronounced that trial lacked fundamental fairness).

State v. Morales, 198 Ariz. 372, 10 P.3d 630, ¶¶ 8–15 (Ct. App. 2000) (defendant's testimony directly contradicted officers' testimony, prosecutor asked defendant whether officers were lying, and defendant did not object; court held that, even assuming prosecutor's question was improper, error was not fundamental).

701.040 A person may give an opinion of the value of property if the person is the owner or the equivalent, and any explanation of basis for the opinion goes to weight of the evidence.

Salt River Project v. Miller Park LLC, 216 Ariz. 161, 164 P.3d 667, ¶¶ 36–38 (Ct. App. 2007) (court rejected plaintiff's claim that, in condemnation action, jurors should have based verdict only on experts' valuation of property and should have disregarded owner's testimony about value of property); *vac'd in part*, 218 Ariz. 246, 183 P.3d 497 (2008).

OPINION AND EXPERT TESTIMONY

701.050 The opinion must assist the trier-of-fact in understanding the evidence or in determining a fact in issue, and not merely tell the trier-of-fact how to decide the case.

State v. Harrod, 200 Ariz. 309, 26 P.3d 492, ¶¶ 27–28 (2001) (in case-in-chief, defendant suggested ex-wife and her family were lying about his involvement in murder because of bitterness over divorce; court held this opened door and allowed state to call ex-wife in rebuttal to ask her why she had divorced defendant; ex-wife testified that she divorced him because he told her he had killed victim; court held this was not opinion testimony about defendant's guilt).

Fuenning v. Superior Ct., 139 Ariz. 590, 680 P.2d 121 (1983) (in DUI case, officer should not be asked to give opinion whether defendant was intoxicated when driving, but may give opinion whether defendant showed symptoms of intoxication).

State v. Rhodes, 219 Ariz. 476, 200 P.3d 973, ¶ 13 (Ct. App. 2008) (court held that, when defendant is charged with sexual conduct with child, evidence of defendant's sexual normalcy, or appropriateness in interacting with children, is character trait and one that pertains to charges of sexual conduct with child, and such testimony would not invade province of jurors).

State v. Campoy (Cordova), 214 Ariz. 132, 149 P.3d 756, ¶¶ 6–12 (Ct. App. 2006) (defendant was charged with DUI; court held trial court abused discretion in ruling that state's witnesses, when testifying about FSTs, could not use such terms as "impairment," "sobriety," "tests," "pass/fail," "marginal," or "field sobriety test").

State v. Herrera, 203 Ariz. 131, 51 P.3d 353, ¶¶ 7–8 (Ct. App. 2002) (while testifying about FSTs, officer stated, "I felt he was impaired to the slightest degree"; court held officer's testimony was impermissible, but trial court did not err in denying motion for mistrial because trial court immediately struck officer's testimony and gave detailed curative instruction, and in final instruction repeated that curative instruction and told jurors to disregard any stricken testimony).

State v. Lummus, 190 Ariz. 569, 950 P.2d 1190 (Ct. App. 1997) (court was concerned that officer testified that, on intoxication scale of 1 to 10, defendant was 10+, but held error was harmless beyond reasonable doubt).

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